EXHIBIT 3

CASE NO. ____________

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARL CASE,	)
	)
Movant,	)
	)
v.	)
	)
TIM HATCH,	)
Warden, Guadalupe County	)
Correctional Facility,	)
	)
Movee.	)

MOTION FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE HABEAS PETITION BY A PRISONER IN STATE CUSTODY

Respectfully submitted,

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MOTION FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE HABEAS PETITION

Under 28 U.S.C. § 2244(b)(3) and Rule 27 of the Federal Rules of Appellate Procedure, Carl Case, by and through undersigned counsel, moves the Court for an order authorizing the United States District Court for the District of New Mexico to consider his Petition for a Writ of Habeas Corpus. As grounds, Mr. Case states the following:

1. The District Court of Eddy County, State of New Mexico, entered a judgment of conviction against Mr. Case in case number CR-82-70.

2. The judgment of conviction was the result of jury verdicts of guilty and was entered on November 1, 1982.

3. The jury convicted Mr. Case of: (a) felony murder in the first degree, and (b) criminal sexual penetration in the first degree.

4. The jury spared Mr. Case the death penalty, but District Judge Harvey W. Fort sentenced Mr. Case to consecutive sentences of life imprisonment and fifteen years.

5. Mr. Case appealed his convictions and sentences to the Supreme Court of New Mexico.

6. On January 13, 1984, the Supreme Court of New Mexico affirmed Mr. Case's convictions and sentences.

7. In 1984 and under 28 U.S.C. § 2254, Mr. Case petitioned the United States District Court, District of New Mexico, case number CV 84-269, for a Writ of Habeas Corpus.

8. As grounds for relief in his 1984 petition, Mr. Case asserted the following claims:

(a) he was denied his rights to due process and effective assistance of counsel when, pre-trial, the trial judge refused to appoint him different counsel or to recuse himself after citing defense counsel for misconduct and threatening to file a disciplinary complaint following trial;

(b) he was denied his right to present evidence in his own defense when the trial court refused to permit a witness to present certain hearsay testimony;

(c) he was denied his right to present evidence in his own defense when the trial court refused to continue the trial so that he could secure the attendance of a favorable witness; and

(d) he was denied his right to a fair and impartial jury when the trial judge refused to voir dire the jury concerning jury misconduct.

9. The United States Magistrate found that Mr. Case was provided with effective assistance of counsel, but that he was denied the right to present evidence in his defense and the right to a fair and impartial jury. The magistrate recommended that Mr. Case be granted the Writ.

10. The district court adopted the findings and recommendation of the magistrate and granted Mr. Case a Writ of Habeas Corpus on November 25, 1985.

11. The order of the district court was appealed and cross-appealed to this Court in Tenth Circuit case numbers 85-2937 and 86-1042.

12. On March 6, 1987, this Court dismissed Mr. Case's cross-appeal, vacated the district court's order granting the Writ, and remanded the case for an evidentiary hearing.

13. After holding an evidentiary hearing, the magistrate found that Mr. Case was not denied the right to present a defense, but that he suffered a wrong of federal constitutional dimension when the trial court refused to voir dire the jury concerning the misconduct. Accordingly, the magistrate recommended that Mr. Case's Petition for a Writ of Habeas Corpus be granted.

14. The district court adopted the magistrate's findings and recommendation and granted Mr. Case a Writ of Habeas Corpus on March 24, 1988.

15. The district court's order was appealed and cross-appealed to this Court in Tenth Circuit case numbers 88-1685 and 88-1748.

16. In *Case v. Mondragon*, 887 F.2d 1388 (10th Cir. 1989), this Court reversed the district court's order granting the Writ on the juror misconduct issue, and affirmed the district court's denial of Mr. Case's petition on the right to present favorable evidence issue.

17. Other than the foregoing, Mr. Case has not sought post-conviction relief in any federal court.

18. Mr. Case now seeks to have the United States District Court for the District of New Mexico consider his Petition for a Writ of Habeas Corpus on the grounds that he was denied his constitutional right to due process when the State withheld favorable and material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In support, Mr. Case states the following facts:

(a) on January 30, 1982, the body of Nancy Mitchell, a sixteen-year old runaway who had been missing for several weeks, was found decomposing in the bushes along the Pecos River clad in red pants;

(b) although there was no bruising to Ms. Mitchell's legs, thighs, back, or pelvic area, there was severe bruising to Ms. Mitchell's upper torso, neck, face, and head, indicating that she had been beaten;

(c) there were drag marks on the front of Ms. Mitchell's hands and feet, as well as on her abdomen, indicating that Ms. Mitchell's body had been dragged to the location where it was found;

(d) police were initially interested in a teenager named Bobby Autry after learning that the last time Ms. Mitchell was seen alive, she was with Mr. Autry and was wearing red pants;

(e) in a statement given to police not long after Ms. Mitchell's body was found, Mr. Autry admitted to driving Ms. Mitchell around in his car in the timeframe of her disappearance, but claimed that he dropped her off at the Dairy Queen in the early morning hours and had not seen her since;

(f) nearly a month-and-a-half after Ms. Mitchell's body was found, Mr. Autry failed a polygraph test when asked four key questions relating to his involvement in the death and disappearance of Ms. Mitchell;

(g) after failing the polygraph test, Mr. Autry told the police a story exculpating himself, but inculpating Mr. Case and several other young men in an alleged brutal gang-rape of Ms. Mitchell;

(h) after telling this story to the police, Mr. Autry was not given another polygraph test;

(i) although there was no evidence of a sexual assault and no forensic evidence linking anybody to the alleged gang-rape and subsequent death of Ms. Mitchell, the State sought the death penalty when it tried Mr. Case for raping and murdering Ms. Mitchell;

(j) key to the State's case was the inherently contradictory "eye-witness" testimony of Mr. Autry and two other teenagers, Audrey Knight and Paul Dunlap;

(k) in 2003, Ms. Knight came forward on her own volition and confessed under oath that she had lied at Mr. Case's trial and that all of her testimony incriminating to Mr. Case was a complete fabrication;

(*l*) during the evidentiary hearing held in the state proceeding, Ms. Knight testified that she fabricated her story because she was harassed by the police and felt pressured to help solve the mystery of Ms. Mitchell's death;

(m) without knowing that Ms. Knight had confessed under oath to fabricating her trial testimony, Mr. Dunlap also came forward in 2003 and confessed under oath that he had lied at Mr. Case's trial and that all of his testimony incriminating to Mr. Case was a complete fabrication;

(n) during the evidentiary hearing held in the state proceeding, Mr. Dunlap testified that he fabricated his testimony after being implicated in Ms. Mitchell's death and after languishing in juvenile detention for six months knowing that the State was attempting to try him as an adult, but also knowing that an offer of immunity had been extended to him in exchange for favorable testimony;

(o) based on the sworn confessions of Ms. Knight and Mr. Dunlap that their trial testimony implicating Mr. Case was a complete fabrication, Mr. Case sought post-conviction relief in state court;

(p) after Mr. Case filed his petition in state court, Mr. Case's counsel obtained access to the original prosecution file, which had been stored in the district attorney's archives over 200 miles offsite;

(q) while reviewing the prosecutor's file, Mr. Case's counsel uncovered a statement that Mr. Autry had given to the police that had not been turned over to Mr. Case's trial counsel;

(r) in the suppressed statement, given just three days after Ms. Mitchell's body was found, Mr. Autry admitted after being read his *Miranda* rights that he had earlier lied to the police about never having had sexual intercourse with Ms. Mitchell;

(s) in the suppressed statement, Mr. Autry told the police that the reason he had lied about not having sexual intercourse with Ms. Mitchell was because he did not believe the police thought that Ms. Mitchell had been raped;

(t) in the suppressed statement, Mr. Autry described a scene around the time of Ms. Mitchell's disappearance in which he began having sexual intercourse with Ms. Mitchell in the back seat of his car;

(u) in the suppressed statement, Mr. Autry told the police that after beginning to have sexual intercourse, Ms. Mitchell got "mad" and "shoved" Mr. Autry off of her;

(v) in the suppressed statement, Mr. Autry admitted to the police that after Ms. Mitchell got mad and shoved him off, Mr. Autry himself got “mad” and “teed off”;

(w) at the end of Mr. Autry’s suppressed statement, the police obtained samples of Mr. Autry’s saliva and head and pubic hair, revealing that the police believed Mr. Autry to be a key suspect early on in their investigation;

(x) although Mr. Case’s trial counsel had requested all *Brady* material, and although the State turned over three other non-incriminating statements made by Mr. Autry that did not include the above information, the State never disclosed this critical statement that Mr. Autry gave to the police;

(y) besides not disclosing the critical statement of Mr. Autry, the prosecuting attorney at Mr. Case’s trial, James Klipstine,[1] affirmatively solicited testimony from Mr. Autry, both during his direct examination and in his re-direct examination, that Mr. Autry had never had sexual intercourse with Ms. Mitchell;

[1] In 1989, the Supreme Court of New Mexico indefinitely suspended Mr. Klipstine from the practice of law for “submitting falsified documents to the Court” and for seeking “to avoid the consequences of his ineptitude by lying.” *In re Klipstine*, 775 P.2d 247, 248, 249 (N.M. 1989).

(z) moreover, at Mr. Case's trial Mr. Klipstine elicited testimony from Ms. Mitchell's best friend, Melanie Kirkes, that Ms. Mitchell "was scared of" sexual intercourse;

(aa) Mr. Case's trial counsel had no reason to believe that Mr. Autry's testimony was a lie, and that, in fact, Mr. Autry did have sexual intercourse with Ms. Mitchell around the time of her disappearance, and that Mr. Autry had gotten "mad" and "teed off" after Ms. Mitchell had gotten mad and shoved him off of her;

(bb) during Mr. Case's state post-conviction proceeding, Mr. Case, in conjunction with one of his co-defendant's in a companion case, obtained a court order to have an independent laboratory test the following for DNA: (i) oral swabbings taken from Ms. Mitchell's body, (ii) vaginal swabbings taken from Ms. Mitchell's body; (iii) anal swabbings taken from Ms. Mitchell's body, (iv) fingernail clippings taken from both of Ms. Mitchell's hands, and (v) two cuttings taken from the crotch area of the underpants that Ms. Mitchell was wearing when her body was found;

(cc) the DNA testing, which was unavailable to Mr. Case in 1982, revealed a moderate to heavy presence of female DNA in some of the samples, but the complete absence of male DNA in all of the samples;

(dd) during the evidentiary hearing in the state-court proceeding, Mr. Case's trial attorney testified that had the taped statement of Mr. Autry been disclosed, it would have been key to his defense strategy in that he was looking for somebody else to blame for Ms. Mitchell's death.

19. Mr. Case's *Brady* claim has never been raised in a prior federal petition, application, or motion and there is currently no motion or appeal pending in any other court as to Mr. Case's judgment.[2]

20. To authorize the district court to consider Mr. Case's Petition for a Writ of Habeas Corpus, this Court must first determine whether Mr. Case has made a *prima facie* showing that he has satisfied the requirements of 28 U.S.C. § 2244(b). *See* § 2244(b)(3)(C); *see also Daniels v. United States*, 254 F.3d 1180, 1188 (10th Cir. 2001) ("[R]egardless of when their first petitions were filed, prisoners must turn to our court as a gatekeeper under section 2244 of AEDPA.").

21. Section 2244(b)(2)(B) requires Mr. Case to make a *prima facie* showing to this Court that:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

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[2] Out of an abundance of caution, Mr. Case is simultaneously filing his proposed petition in the district court in order to preserve his rights under 28 U.S.C. § 2244(d). Mr. Case is requesting the district court to stay proceedings until this Court rules on his motion.

> convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2244(b)(2)(B).

22. Regarding Section 2244(b)(2)(b)(i), Mr. Case could not have discovered the suppressed statement of Mr. Autry through the exercise of due diligence. The prosecution retained possession of this suppressed statement in its archives, and the chain of events leading to its discovery did not start until Ms. Knight and Mr. Dunlap came forward and confessed under oath that their testimony incriminating to Mr. Case had been entirely fabricated. As soon as Ms. Knight and Mr. Dunlap came forward, Mr. Case acted with great diligence in pursuing relief.

23. Similarly, although Mr. Case knew Ms. Knight and Mr. Dunlap were lying at his trial, Mr. Case could not have "discovered" their decision to come forward and confess the truth any earlier than he did. *See United States v. Ramsey*, 726 F.2d 601, 604–05 (10th Cir. 1984) (stating, in the context of a motion for new trial, that "it is unrealistic to assume that the defense attorneys could have elicited the recantation at trial," and holding that "the defendant, exercising reasonable diligence, could not have discovered and produced this evidence at trial").

24. Section 2244(b)(2)(B)(ii) "is often referred to as the 'innocence' component" of the procedural barrier to a second or successive habeas petition. *Ochoa v. Sirmons*, 485 F.3d 538, 542 n.4 (10th Cir. 2007); *see also LaFevers v. Gibson*, 238

F.3d 1263, 1265 n.4 (10th Cir. 2001) (noting that a claim of actual innocence standing alone does not support the granting of the Writ, but "operat[es] as a potential pathway for reaching otherwise defaulted constitutional claims").

25. As part of its gatekeeping role at this stage, this Court's review "does not directly concern the merit of the [*Brady*] claim itself but rather the extent to which its predicate facts undercut the jury's finding of guilt[]." *Ochoa*, 485 F.3d at 542 n.4. Here, Mr. Case must simply make a sufficient showing of "'*possible* merit to warrant a fuller exploration by the district court.'" *Id.* (emphasis added) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

26. Since the predicate facts underlying his *Brady* claim clearly undercut the jury's finding of guilt, Mr. Case has made a sufficient showing of possible merit to warrant the district court to more fully explore his *Brady* claim. The sworn affidavits and subsequent sworn testimony of Ms. Knight and Mr. Dunlap that their trial testimony incriminating to Mr. Case was entirely fabricated, along with the DNA evidence refuting the State's theory of a massive gang rape by four young men, establish what Mr. Case has known since he was convicted—that he did not rape and murder Ms. Mitchell.

27. Had Mr. Autry's suppressed statement been disclosed to Mr. Case's trial counsel as required by *Brady*, the defense theory would have been that Mr. Autry, and Mr. Autry alone, was responsible for Ms. Mitchell's death. *See Banks v.*

Reynolds, 54 F.3d 1508, 1519 (10th Cir. 1995) (recognizing that suppressed "evidence in the hands of a competent defense attorney may be used to uncover other leads and defense theories" (internal quotation marks omitted)).

28. The wounds to Ms. Mitchell's body and the lack of any evidence of a sexual assault, are highly consistent with the theory that, after Ms. Mitchell interrupted coitus and shoved Mr. Autry off of her, Mr. Autry got angry, beat Ms. Mitchell, and then dragged her off by himself.

29. Given the nature of the wounds to Ms. Mitchell's body, and the lack of any evidence of a sexual assault, this theory is much more consistent and substantiated than was the State's theory offered at trial that Ms. Mitchell was brutally gang-raped by four young men while lying on a rocky surface and was then carried away into the bushes.

30. Without the benefit of Ms. Knight's and Mr. Dunlap's perjured trial testimony, the State's case rests on the testimony of Mr. Autry, which would have been insufficient by itself for a finding of guilt, particularly in light of the suppressed statement. Given the nature of the wounds to Ms. Mitchell's body, the fact that Ms. Mitchell "was scared of" sexual intercourse, and the fact that the jury learned Mr. Autry was arrested immediately after taking a polygraph test, any self-serving testimony of Mr. Autry would have been thoroughly discredited by the jury.

31. If this Court determines that Mr. Case has not made a *prima facie* showing that he has satisfied the requirements of Section 2244(b)(2)(B), the Court should nevertheless authorize the district court to consider Mr. Case's Petition for a Writ of Habeas Corpus.

32. Mr. Case's first federal Petition for a Writ of Habeas Corpus was filed in 1984, well-before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 100 Stat. 1214.

33. Before AEDPA was enacted, a prisoner attacking his state conviction could file a second or successive habeas petition so long as he had "'not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.'" *McCleskey v. Zant*, 499 U.S. 467, 486 (1991) (quoting pre-AEDPA version of § 2244(b)).

34. "[A]ny claim not raised in an earlier petition was presumptively an abuse of the writ unless the petitioner could demonstrate 'cause' for his earlier failure to raise the claim and 'actual prejudice' resulting from the claimed error." *Daniels*, 254 F.3d at 1190 (footnote omitted) (quoting *McCleskey*, 499 U.S. at 493).

35. If the result for Mr. Case would be different using the pre-AEDPA standard of "cause and prejudice" than it would when applying the AEDPA standard of "actual innocence," using the AEDPA standard in Mr. Case's highly unique situation would be an impermissible retroactive application of AEDPA's

substantive provisions. *See Daniels* 254 F.3d at 1186–88; *id.* at 1195 (finding "no impermissible retroactive effect because the result is the same under either standard"); *see also In re Minarik*, 166 F.3d 591, 601 (3d Cir. 1999) ("[I]f a habeas petitioner had a right to initiate federal proceedings to secure release from confinement prior to AEDPA, and had no such rights thereafter, then AEDPA has altered substantive rights and thereby attached new legal consequences to pre-enactment conduct."); *United States v. Ortiz*, 136 F.3d 161, 166 (D.C. Cir. 1998) (holding that AEDPA would be improperly retroactive if the prisoner "would have met the former cause-and-prejudice standard under *McCleskey* and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA").

36. Mr. Case did not deliberately withhold his *Brady* claim in his 1984 habeas petition and he easily makes a *prima facie* showing that he satisfies the pre-AEDPA "cause and prejudice" standard.

37. A habeas petitioner establishes cause when he makes "'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McCleskey*, 499 U.S. at 494 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "In the context of a *Brady* claim, a defendant cannot conduct the 'reasonable and diligent investigation' mandated by *McCleskey* to preclude a finding of [cause] when the evidence is in the hands of the State." *Strickler v.*

Greene, 527 U.S. 263, 287–88 (1999); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

38. Since the critical suppressed statement of Mr. Autry had always been in the hands of the State, Mr. Case makes a *prima facie* showing that he satisfies the "cause" prong of *McClesky*.

39. Concerning the "prejudice" prong of *McClesky*, Mr. Case need only make a *prima facie* showing at this gatekeeping stage that Mr. Autry's suppressed statement was material under *Brady*. *See Banks*, 540 U.S. at 691 ("[P]rejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." (quoting *Strickler*, 527 U.S. at 282)).

40. When "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," the *Brady* standard of materiality is whether "there is *any* reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphases added).

41. The prosecutor at Mr. Case's trial *affirmatively* solicited from Mr. Autry, not only once, but twice, that Mr. Autry had never had sexual intercourse with Ms. Mitchell. Since the prosecution possessed a taped statement of Mr. Autry showing

that he actually *did* have sexual intercourse with Ms. Mitchell, and that he got "mad" and "teed off" after Ms. Mitchell got mad and shoved him off, the prosecutor knew or should have known that Mr. Autry was committing perjury at Mr. Case's trial.

42. Even when the knowing use of perjury is not at issue, the typical *Brady* standard of materiality is simply whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the [trial] would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This standard does not require the petitioner to show by a preponderance that the outcome would have been different had the evidence been disclosed. Instead, the issue is simply whether the petitioner "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

43. Regardless of whether the applicable standard comes down to: (a) "is there any reasonable likelihood that the false testimony could have affected the judgment of the jury"; or (b) "is there a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different," Mr. Case satisfies the relatively simple burden at this stage of making a *prima facie* showing that Mr. Autry's suppressed statement is material.

44. Keeping in mind that a habeas court is not tasked with assessing the credibility of witnesses, or deciding whether the suppressed evidence incriminates

another or exonerates the petitioner when reviewing a *Brady* claim on its merits, *see Reynolds*, 54 F.3d at 1521, Mr. Autry's suppressed statement is material for *Brady* purposes because:

(a) had Mr. Autry's suppressed statement been disclosed as required by *Brady*, the defense theory at trial would have been completely different in that Mr. Case's trial counsel could have used the statement to argue that Mr. Autry, and Mr. Autry alone, was the real perpetrator. *See Reynolds*, 54 F.3d at 1519 (drawing reasonable inferences as to what other lines of defense could have been pursued had *Brady* material been disclosed since "evidence in the hands of a competent defense attorney may be used to uncover other leads and defense theories" (internal quotation marks omitted)).

(b) had Mr. Autry's suppressed statement been disclosed as required by *Brady*, Mr. Case would have used the evidence to raise "serious questions about the manner, quality, and thoroughness of the investigation." *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986). Since the evidence was not disclosed, Mr. Case's trial attorney was denied a significant opportunity "to discredit the caliber of the investigation or the decision to charge" Mr. Case. *Id.*; *see also Kyles*, 514 U.S. at 445 (recognizing that suppressed statements could have been used to attack "the thoroughness and even the good faith of the investigation").

(c) had Mr. Autry's suppressed statement been disclosed as required by *Brady*, the evidence, at a minimum, "would have fueled a withering cross-examination, destroying confidence in [Mr. Autry's] story and rais[ed] a substantial implication that the prosecutor had coached him to give it." *Kyles*, 514 U.S. at 443.

45. Moreover, "[t]he potential impact of the undisclosed evidence should be weighed in light of the whole record. What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994).

46. Given the inherent and significant contradictions between the "eye-witnesses" at trial, the State's case was questionable from the very start. The sworn confessions of Ms. Knight and Mr. Dunlap that their trial testimony incriminating to Mr. Case was a complete fabrication, along with the DNA evidence refuting the State's theory that Ms. Mitchell was gang-raped by four young men, boldly underscore the flimsiness of the verdict at trial.

47. Attached to this motion is a copy of the Petition for a Writ of Habeas Corpus (without Exhibits) that Mr. Case is asking the Court to authorize the district court to review. *See Bryan v. Mullin*, 100 F. App'x 783, 786 n.2 (10th Cir. 2004) (noting

for the benefit of counsel that "the better practice [is] to attach a copy of the proposed second or successive § 2254 petition to any § 2244(b)(3) request filed in this court").

48. The New Mexico Attorney General opposes this motion.

Wherefore, for the foregoing reasons, Mr. Case prays that the United States Court of Appeals for the Tenth Circuit enter an order authorizing the District Court for the District of New Mexico to consider his second or successive Section 2254 Petition for a Writ of Habeas Corpus.

Respectfully submitted,

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